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SHARP REES-STEALY MEDICAL GROUP INC.
7 GROUP LONG TERM DISABILITY INSURANCE PLAN

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 KENT E. KIMBERLY, M.D., an
individual,
12
Plaintiff,
13
v.
14 SHARP REES-STEALY MEDICAL
GROUP INC. GROUP LONG TERM
15 DISABILITY INSURANCE PLAN,
16
Defendant.

CASE NO. 08 CV 0157 JLS (POR)

**DEFENDANT SHARP REES-STEALY
MEDICAL GROUP INC. GROUP LONG
TERM DISABILITY INSURANCE PLAN'S
NOTICE OF MOTION AND MOTION TO
STRIKE PURSUANT TO FED.R.CIV.P.
12(f) OR, IN THE ALTERNATIVE,
MOTION TO DISMISS PURSUANT TO
FED.R.CIV.P. 12(b)(6)**

JUDGE: Honorable Janis L. Sammartino
CTRM: 6 (Third Floor)
DATE: July 17, 2008
TIME: 1:30 p.m.

19
20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on July 17, 2008 at 1:30 p.m., or as soon thereafter as the
22 matter may be heard in Courtroom 6 of the above-entitled court, located at 940 Front Street, San
23 Diego, California, defendant Sharp Rees-Stealy Medical Group Inc. Group Long Term Disability
24 Insurance Plan ("the Plan") will and hereby does move the court for an order striking, or in the
25 alternative, dismissing with prejudice any and all allegations and prayers for relief relating to his
26 claim for breach of fiduciary duty and injunctive and other equitable relief under ERISA Section
27 502(a)(3). Plaintiff is precluded from seeking relief against Hartford, an unnamed party;
28 Hartford is not a proper party to this lawsuit since the claim must be against the Plan or Plan

1 sponsor, and as a matter of law, plaintiff cannot join a breach of fiduciary duty claim in the same
2 action as a claim for benefits under (a)(1)(B). The relief that plaintiff seeks with his (a)(3) claim
3 is entirely duplicative of relief that could be awarded under (a)(1)(B), and thus he has an
4 adequate remedy at law under (a)(1)(B). Furthermore, plaintiff has no standing to pursue
5 injunctive relief on behalf of third party claimants, and he cannot satisfy the federal requirements
6 to obtain an injunction.

7 Accordingly, he cannot sustain his claims and prayers for relief under Section 502(a)(3),
8 and the following paragraphs set forth in his First Amended Complaint should be stricken and/or
9 dismissed with prejudice:

10 Paragraph 129, 22:21-23—"Upon information and belief, Hartford regularly utilized and
11 continues to regularly utilize UDC to arrange, direct, orchestrate or conduct paper reviews on
12 claimants' claims under Hartford Policies."

13 Paragraph 130, 22:24-28—"Plaintiff is informed and believe [sic] and based thereon
14 alleges that as a result of UDC's frequent orchestrating and handling of reviews for Hartford, as
15 its agent in the investigation and administration of Plaintiff's claim, renders UDC's file materials
16 (whether hard copy or electronically generated or stored) part of the 'administrative record' –
17 whether or not Hartford has gathered them to retain in its claim file."

18 Paragraph 131, 23:1-4—"Hartford failed to obtain from UDC a copy of its file materials
19 and all other UDC-related documents, notes, writings, including electronic information related to
20 the investigation of Dr. Kimberly's Claim on behalf of Hartford to include in the
21 'Administrative' Record and ensure it is complete."

22 Paragraph 132, 23:5-8—"Hartford similarly failed and refused to obtain all other related
23 documents, notes, writings, including electronic information from Drs. [sic] Leyenson and Dr.
24 Olander related to their communications with both Hartford and UDC or any other entity or
25 person related to the claim of Dr. Kimberly so that it could be included with the rest of the claim-
26 related information (the "Administrative Record")."

27 Paragraph 133, 23:9-14—"The regulations of the secretary of Labor define at 29 C.F.R. §
28 2560.503-1(m)(8) what are the 'relevant' documents and information which must be provided to

1 plan participants upon request, including those at (I) that were actually ‘relied on’ by the
 2 decision maker in making the benefit determination, and (ii) those that were ‘submitted,
 3 considered, or generated in the course of making the benefit determination, without regard to
 4 whether such document, record, or other information was relied upon in making the benefit
 5 determination.’”

6 Paragraph 134, 23:15-19—“Upon information and belief, Hartford’s failure to properly
 7 gather and maintain in all its related to the claim an actual copy of all ‘*documents, records, and*
 8 *other information relevant to the claimant’s claim for benefits*’ described under the regulations at
 9 29 C.F.R. § 2560.503-1 at (j)(3) and expressly defined under subsection (m)(8), is a violation of
 10 its fiduciary duties to maintain an accurate copy of the ‘Administrative Record.’”

11 Paragraph 135, 23:20-23—“Upon information and belief, Hartford’s failure to obtain
 12 information related to the claim generated by or on its behalf during the claim investigation and
 13 administration improperly truncated the ‘Administrative Record,’ and failed to provide Plaintiff
 14 with ‘reasonable access to’ copies of said documents records and information, and risked – if not
 15 effectuated – a spoliation of evidence.”

16 Paragraph 136, 23:24-27—“Plaintiff is informed and believes and based thereon alleges
 17 that Hartford thus intentionally truncated the ‘administrative record’ by not including documents
 18 within the possession and control of agents employed by Hartford to assist with investigating the
 19 claim for and on behalf of Hartford, and are thus documents within Hartford’s constructive
 20 control and possession.”

21 Paragraph 137, 24:1-13—“Upon information and belief, Hartford’s failures and breaches
 22 of the ERISA regulations which form the minimum requirements and responsibilities of the
 23 claims administrator, and refusal to comply with the requirements of the regulations and
 24 information required by Title I of ERISA, justify appropriate relief by this court in its discretion,
 25 including but not limited to:

26 137-(1) *injunctive relief* under 502(a)(3) compelling the claims
 27 administrator to immediately obtain and provide Plaintiff with any and all
 28 documents, records, information, writings, including electronically stored, by

UDC and by Dr. Leyenson and Olander that are “relevant to” Plaintiff’s claim as defined under subsection (m) of the regulations.

137-(2) *adverse inference* against Hartford regarding all information generated by UDC or its hired reviewers for Hartford that Hartford and its agents continue to conceal and/or spoil;

137-(3) *permanent injunction* against further such failure and refusal to gather and maintain all relevant information pertaining to Plaintiff’s claim, into the future, by Hartford and any of its agents or employees engaged to perform work related to Plaintiff’s claim.”

Paragraph 143, 25:11-15—“Plaintiff seeks to enjoin Hartford from violations of the notice and disclosure requirements mandated by the Secretary’s Regulations and of the ‘meaningful dialogue’ mandated by this Circuit for over a decade pursuant to Booton v. Lockheed Med. Benefit Plan, 110 F.3d 1461, 1463-64 (9th Cir. 1997), Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955 (9th Cir. 2006) *en banc*, Saffon v. Wells Fargo & Co. LTD Plan (re MetLife), 2008 U.S. App. LEXIS 8136 (9th Cir. April 16, 2008).”

Under plaintiff’s Prayers for Relief:

Paragraph 5, 26:15-22—“Such other appropriate equitable relief as the Court deems proper including but not limited to (a) *injunctive relief* under 502(a)(3) compelling Hartford to immediately obtain and provide Plaintiff with any and all notes, documents, records, information, writings, including electronically stored, to, from or generated by University Disability Consortium by Drs. Leyenson Olander [sic] for Hartford after Plaintiff’s appeal; (b) *permanent injunction* against further such failure and refusal to gather and maintain all relevant information pertaining to any record reviews or other new-evidence gathering activities after an appeal of a denied claim is received.”

Paragraph 6, 26:23-25—“For any appropriate equitable relief under ERISA §502(a)(3) as the court deems proper to remedy improper claims handling or breaches of fiduciary duty and/or acts or practices which violate ERISA and/or the terms of the PLAN;”

The Plan’s motion will be and is based on this notice of motion and motion, the

1 concurrently-filed memorandum of points and authorities, the allegations in plaintiff's First
2 Amended Complaint, any reply memorandum later filed by the Plan, and such other and further
3 oral or documentary evidence as may be presented at or before the time of the hearing.

4 DATED: June 10, 2008

SEDGWICK, DETERT, MORAN & ARNOLD LLP

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6 By: s/Dennis G. Rolstad

7 Dennis G. Rolstad

8 Erin A. Cornell

9 Attorneys for Defendant

SHARP REES-STEALY MEDICAL GROUP INC.

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11 PLAN
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